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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

In re T.B., a Person Coming Under the Juvenile Court Law.	
ALAMEDA COUNTY SOCIAL SERVICES AGENCY, Plaintiff and Respondent, v. J.B., Defendant and Appellant.	A133629, A135136 (Alameda County Super. Ct. Nos. OJ1014080, OJ11016725)

In these two appeals J.B., the mother of T.B., challenges the dependency court's refusal to allow her to present expert testimony on whether her visitation with T.B would be in the child's best interest. In appeal number A133629, she appeals from an order denying her Welfare and Institutions Code section 388 petition for visitation with T.B.[1] In A135136, she appeals from an order terminating her parental rights to T.B., arguing that the order must be reversed because of the alleged error in connection with the section 388 petition. We hereby grant Mother's motion to consolidate these appeals for purposes of decision and any further briefing. We hold that the trial court did not abuse its discretion when it excluded the expert testimony, and affirm both orders.

[1] Unless otherwise indicated, further statutory references are to the Welfare and Institutions Code.

I. BACKGROUND

T.B. was detained on January 8, 2010, when police responded to a report of a child crying, and found her home alone at 4:00 a.m. Neither Mother nor any biological relative could be located and T.B. was taken into foster care. Mother's whereabouts were still unknown when the jurisdiction and disposition hearing was held on January 27th. The agency's report for the hearing stated that Mother had an extensive history of drug use, and had abandoned her two older children, who were permanently placed in foster care. The court adjudged T.B. a dependent child, found that Mother was not entitled to reunification services, ordered a permanent plan of guardianship, continued T.B. in foster care pending assessment of the prospective guardian, and set a section 366.26 (.26) hearing for May 25.

T.B. was turned out of her initial foster placement because of "risky behaviors, including lighting plastic objects on fire . . . ." She was referred to the SEED (Services to Enhance Early Development) program for "intensive . . . mental health services" "due to the severity of trauma [she] experienced prior to her detention and the complexity of her emerging mental health symptoms in foster care." The agency reported for the .26 hearing that T.B. "hears 'little people in my head,' four of whom [she has] named; has headaches; has a history of fire-starting, spends about an hour daily singing and/or crying; shows sexualized development such as use of precocious language and showing her underwear; gets into character and acts out several people with different voices, and is very afraid of night-time and bath-time. [She] shows patterns of indiscriminately attaching to others."

In February, Mother contacted the agency and participated in a March team meeting about T.B.'s placement. On March 19, T.B. was placed in the foster home of L.B., a prospective adoptive parent. The report for the .26 hearing stated that Mother spoke on the phone with T.B. in March, and that after the call T.B. "was crying, talking to herself and inconsolable for a long period of time." In a May 24 report, T.B's SEED clinician, Stephanie Gomez, recommended against any contact between T.B. and Mother. Mother had a second phone conversation with T.B. in May, and T.B.'s compulsive

behavior after the call suggested to Gomez "that even supervised telephone contact with [Mother was] triggering a traumatic response in [T.B.]" On May 25, the court continued the .26 hearing to September 27, 2010.

On the basis of changed circumstances, Mother petitioned the court under section 388 for reunification services and visitation with T.B. Mother supported her application with reports from psychologists Pari Anvar and Patricia Weiss who recommended, based on their assessments of Mother, that she be allowed to have contact with T.B. The agency filed a report from Gomez stating that contact with Mother would be detrimental to T.B., and an evaluation of T.B. from psychologist Tricia Fong stating that any contact between Mother and T.B. had to be "thoughtfully and carefully" considered "given the extent and severity of [T.B.'s] posttraumatic stress symptoms, and [T.B.'s] emotional and behavioral dysregulation around trauma reminders."

The agency reported for a July status review hearing that L.B. was "unable or unwilling to adopt because of special circumstances but [was] willing to provide [T.B.] with a stable and permanent environment." On July 21, the court ordered a permanent plan "of placement with a planned permanent living arrangement and a specific goal of termination of parental rights and adoption."

At a hearing on September 15, the court declined to offer Mother reunification services, or allow her visitation with T.B. Visitation was withheld due to T.B.'s "extremely fragile mental health," and the fact that Mother "ha[d] just begun treatment and therapy for her own mental health and substance abuse issues." The court's minute order stated that "[t]he Agency and [T.B.'s] counsel will continue to assess [T.B.'s] readiness to resume contact with [Mother]. . . . [¶] . . . [¶] If and when [T.B.'s] therapists and care providers feel that [T.B.] is stable enough to handle telephone contact with the Mother, and the Mother shows progress in her therapy and substance abuse programs, a supervised phone call will be arranged with therapeutic support." The .26 hearing set for September 27 was vacated, and a review hearing was scheduled for February 24, 2011.

The agency's report for the February hearing advised that L.B. "ha[d] made it increasingly clear" that she could not provide permanency for T.B., and the agency was

looking for her new permanent home. The agency filed a February 15 report from Gomez stating that T.B. had "begun to develop a cohesive narrative regarding her trauma experience and her entry into foster care. She has detailed to both her foster parent and to this clinician multiple incidents of neglect and abandonment and has repeatedly verbalized her fear of being left again in the care of her mother. [T.B.] is articulate in recalling a long history of neglect, food insecurity, and abandonment, emotional and physical abuse and exposure to inappropriate sexual activity . . . ."

The agency reported that there had been no contact between T.B. and Mother since the September hearing, and Gomez opined that consideration of phone calls between them should be deferred until a permanent plan was finalized. Gomez said that, if calls were resumed, "we would expect to see 1) an increase in self-harm behaviors 2) A regression toward dissociate symptoms and auditory hallucinations 3) Dysregulation of affect 4) Increased and repetitive traumatic play themes 5) Increased frequency and intensity of nightmares and regression in sleep regulation." The agency agreed that contact with Mother would not be in T.B.'s best interest. The agency report stated that Mother's therapist, Loretta Abbot, also thought "that now would not be an appropriate time to re-initiate contact. This decision was made in part because of [T.B.'s] anticipated change of placement and the desire to maintain as much stability as possible through the process, without adding additional stressors or confusion."

The agency report attached documents showing that Mother had made progress in substance abuse and mental health treatment, and secured part-time employment. Mother filed a request for visitation with T.B., supported with documents showing that she had avoided drug and alcohol use, and obtained permanent housing.

At the February 24 hearing, the court identified adoption as the goal of T.B's permanent plan, set a progress report hearing for May 19, and a review hearing for July 25. The court did not grant Mother visitation. We affirmed this order in *In re T.B.* (Mar. 15, 2012 A131457) (nonpub. opn.) and rejected Mother's argument that the court erred when it denied her a contested hearing on the visitation issue.

On May 19, the court continued prior orders in effect, and the parties were directed to submit petitions based on changed circumstances under section 388 if they wanted any changes.

For the July 25 hearing, the agency reported that T.B. had been placed in June with a paternal aunt, G.C., who wanted to adopt her. The report recommended that Mother have no contact with T.B., and that a .26 hearing be set for a permanent plan of T.B.'s adoption by G.C. At the July 25 hearing, Mother advised that she had retained an expert, would contest the agency's recommendations, and seek visitation. Prior orders were continued, and a contested hearing was set for September 26.

On September 6, Mother filed her petition for modification seeking to secure visitation and attached a report from psychologist Weiss, who concluded that visitation with Mother would be in T.B.'s best interest. Weiss believed there was "no substitute for the intense, biological bond between a parent and child." Weiss had "no doubt that [T.B.] experienced physical abuse and neglect by [Mother] during periods of time while growing up," but opined that "continuing to deprive [T.B.] of any contact with her mother is harmful to [T.B.] at present and will create multiple difficulties for her on an emotional and a psychological plane in the future."

At the September 26 hearing, the agency and T.B. argued that Mother had not shown changed circumstances that would justify contact between T.B. and Mother, and that the court should decline to hold a hearing on the section 388 petition. The court allowed Mother to testify, and deferred deciding whether it would permit testimony from Weiss.

Mother testified that she had lived at the same address for a year, taken parenting classes, graduated from a drug treatment program, and submitted to successful drug testing. She was working part-time in retail sales, and participating regularly in psychotherapy. Although she had a "nervous breakdown" before her last court appearance and spent 72 hours in a "psych ward," she was taking medications for her bipolar disorder and manic depression.

After Mother testified, the court asked her for an offer of proof as to Weiss's testimony. Mother said that Weiss would opine that she "is psychologically fit and poses no danger from a psychological point of view in being able to visit with her daughter." Weiss would also say that lack of contact with Mother was detrimental to T.B. The agency and T.B. argued that Weiss's opinion as to whether visits with Mother were in T.B.'s best interests had little probative value because Weiss had not examined T.B. Mother stated that the court had declined to permit such an examination. The court said it had also read Weiss's report, found Weiss's statements about a bond between Mother and T.B. "conclusory," and precluded Weiss from testifying.

The court found that Mother's testimony had established no changed circumstances that should allow contact with T.B., but was willing to entertain further testimony on visitation. Mother then called therapist Gomez, who testified that she had been seeing T.B. since February 2010, and that contact with Mother would not be in T.B.'s best interest.

The court continued the hearing on visitation for argument on October 14, and set a .26 hearing on termination of parental rights and a permanent plan of adoption. In *J.B. v. Superior Court* (Jan. 17, 2012 A133628) (nonpub. opn.), we denied Mother's writ petition challenging the order setting the .26 hearing, rejecting her argument that the court erred in denying her a contested hearing. At the October 14 hearing, the court denied the section 388 petition.

The agency reported for the .26 hearing that T.B.'s symptoms of PTSD were significantly better, and that she was no longer in therapy with Gomez. "One area of note [was T.B.'s] fairly recent ability to sleep alone in her own room through the night with no nightmares or need to come to the room of her proposed adoptive parent." Gomez wrote a February 23 letter recounting T.B.'s "remarkable progress since initial placement eight months ago with [G.C.]." Gomez stated: "[T.B.] has endured more pain and suffering than any human should have to endure. However, with the support of intensive early intervention, multiple resiliency factors and a quality caregiver who is eager to provide permanency, [T.B.] now has the capacity to grow and thrive."

Mother did not attend the .26 hearing, and the court terminated her parental rights.

II. DISCUSSION

A. Appeal No. A133629

(1) Motion to Dismiss

The agency has moved to dismiss appeal A133629 on the ground that Mother was required to seek writ review of the denial of her section 388 petition because granting the petition "would require vacation or reversal of the .26 setting order itself." It is settled that orders entered contemporaneously with an order setting a .26 hearing are not appealable, and must be reviewed via a writ petition under California Rules of Court, rule 8.452. (§ .26, subd. (*l*)(1); *In re Tabitha W.* (2006) 143 Cal.App.4th 811, 815–817; *In re Anthony B.* (1999) 72 Cal.App.4th 1017, 1022–1024.)

But the agency cites no case holding that an order made *after* the setting of a .26 hearing, such as the order denying the section 388 petition in this case, is likewise reviewable only by writ. If that were true, then orders made after a .26 hearing has been set and the deadline for the petition has passed would escape review. Such a rule is contrary to the reason underlying the requirement for a writ petition, which is to "ensure that all outstanding issues will have been reviewed by the Court of Appeal prior to the section [.26] hearing." (*In re Tabitha W.*, *supra*, 143 Cal.App.4th at p. 817.) We therefore agree with Mother that the agency is advocating an unworkable rule, and deny the motion to dismiss.

(2) Review on the Merits

Evidence Code section 801, subdivision (a) authorizes expert testimony on subjects that are "sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." Mother argues that the court should have permitted Dr. Weiss to render the following expert opinions: "1. The agency had given insufficient weight to the existing bond that [T.B.] had with mother. Dr. Weiss's experience with Attachment Theory taught her that the existing parental bond was a powerful force in the child's life." "2. The agency did not correctly evaluate mother's parenting skills. . . . [T.B.] had significant strengths and resilience . . . signs . . . that mother was a caring

parent." "3. The agency . . . [made] an unsupported assumption: that [T.B.] acted out [after her telephone conversations with Mother] because she did not want contact. . . . [T]his conclusion was 'too rapidly entertained.' " "4. The agency also had an incomplete picture of mother's current functioning. While the agency's report portrayed mother as cold and unremorseful, Dr. Weiss had personal experience and testing that proved otherwise."

The agency's threshold response is that Mother forfeited this four-part argument because her counsel, when asked for an offer of proof at the September 26, 2011 hearing, stated that Weiss would render only "two opinions": that Mother was "psychologically fit," and that T.B. was harmed by her lack of contact with Mother. However, the four points Mother raises were all grounded in Weiss's report attached to the section 388 petition, as a written offer of proof. (Seiser and Kumli, Cal. Juvenile Courts Practice and Procedure (2012) § 2.140[2], p. 2-418 ["statements alleged in the petition or the documents attached thereto are in the nature of offers of proof as to what the petition would seek to establish if a hearing were granted"].) The agency's forfeiture argument lacks merit.

The agency next argues that Mother cannot show prejudice from the exclusion of Weiss's testimony because her petition did not establish prima facie cause for a hearing. A section 388 petition can be denied ex parte if it fails to identify a changed circumstance justifying a new order, or show that the requested modification would be in the child's best interest. (Cal. Rules of Court, rule 5.570(d).) The petitioner need only make a prima facie showing, not a probability of prevailing, to obtain a full hearing. (*In re Aljamie D.* (2000) 84 Cal.App.4th 414, 432.) The agency's argument is fallacious because it ignores the fact that the court took testimony from Mother and Gomez on the visitation issue. The trial court necessarily found that the petition made a prima facie case for a hearing, and we have no reason to second guess its determination.

The sole question presented in this appeal is whether the court erred when it excluded Weiss's testimony. The agency argues that Mother "must be deemed to have abandoned the issue" and that "[h]er appeal must be dismissed" because she offers no

"meaningful legal analysis." This is yet another untenable and unnecessary claim. Mother's appellate arguments, while ultimately unavailing, have substance.

"We review the trial court's admission or exclusion of expert testimony under the deferential abuse of discretion standard." (*Tesoro del Valle Master Homeowners Assn. v. Griffin* (2011) 200 Cal.App.4th 619, 639.) "In determining whether to admit expert testimony, the trial court has broad discretion, and we may not interfere with that discretion unless it is clearly abused." (*People v. Bui* (2001) 86 Cal.App.4th 1187, 1196.) The court's ruling cannot be reversed unless it was entirely unreasonable. (*Smith v. Smith* (1969) 1 Cal.App.3d 952, 958.)

Under this deferential standard of review, we cannot conclude that trial court erred. The court read Weiss's report and found her opinions "conclusory" with respect to visitation. To succeed on her section 388 petition, Mother had to prove that visits would be good for T.B. Weiss's opinions on that question were based primarily on the length of time Mother raised T.B. before she abandoned her, and T.B.'s resilience in the face of the considerable adversity Mother had caused her. Although Weiss had "no doubt that [T.B.] experienced physical abuse and neglect by [Mother]," she nevertheless believed that the four years they were together must have established a mother-daughter bond, and that T.B.'s resilience demonstrated that Mother must in some respects have been a good parent. A reasonable judge could find those opinions conclusory and unhelpful to the trier of fact on visitation.

For these same reasons, any error in disallowing Weiss's testimony was harmless. (Evid. Code, § 354 [exclusion of evidence must cause miscarriage of justice].)

B. Appeal No. A135136

Since Mother's challenge to the order terminating parental rights rests entirely on her arguments against denial of the section 388 petition, our resolution of appeal A133629 is dispositive of appeal A135136.

III. DISPOSITION

The orders are affirmed.

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Siggins, J.

We concur:

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Pollak, Acting P.J.

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Jenkins, J.